UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CAROL LEITNER,

Plaintiff,

-against- 12-CV-3778 (CS PED)

WESTCHESTER COMMUNITY COLLEGE, JOSEPH HANKIN, in his personal and official capacity as President of Westchester Community College, CHET ROGALSKI, in his personal and official capacity as Dean and Vice President of Academic Affairs, JIANPING WANG, in her personal and official capacity as Associate Dean of the Arts and Humanities, GABRIELLE MILLER, in her personal and official capacity as Curricular Chairperson of the Communications and Media Arts Department, and the WESTCHESTER COMMUNITY COLLEGE FEDERATION OF TEACHERS LOCAL #2431,

Defendants.
----------X

MEMORANDUM OF LAW IN SUPPORT OF UNION DEFENDANT'S MOTION TO DISMISS

RICHARD E. CASAGRANDE
Attorney for Union Defendant
Office & P.O. Address
52 Broadway - 9th Floor
New York, NY 10004
(212) 533-6300

CHRISTOPHER M. CALLAGY, Of Counsel

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PRELIMINARY STATEMENT

Defendant Westchester Community College Federation of Teachers ("WCCFT" or "union") respectfully submits this memorandum in support of its motion to dismiss the First Amended Complaint ("FAC") dated March 6, 2013. As discussed below, the FAC should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiff fails to state a claim since the sparse facts alleged do not show that WCCFT breached its duty of fair representation to plaintiff, but rather reveal WCCFT's fulfillment of its duty to plaintiff at all relevant times and through the moment plaintiff decided not to proceed to arbitration in light of potentially negative collateral consequences to any future federal claim against defendant Westchester Community College. Moreover, plaintiff's claim is untimely and fails to allege endorsement by all the individual members comprising WCCFT of any actions taken by WCCFT at issue herein.

THE FIRST AMENDED COMPLAINT

Essentially, plaintiff asserts that WCCFT breached its state law duty of fair representation to plaintiff by offering her only a token defense because the union and the college were in cahoots. Indeed, although plaintiff alleges that WCCFT assured the administration of only putting up a token defense on plaintiff's part, the FAC is bereft of a single fact establishing any such communication. See FAC at ¶9.

While the FAC does not allege any facts in support of plaintiff's allegation of token defense, it does make clear that plaintiff, in fact, met with her union representatives to discuss employment concerns relating to a student complaint. FAC at ¶55. Ordinarily, meeting with one's union representatives is a sign of fulfilling a duty of fair representation rather than breaching it.

Notwithstanding the actual support plaintiff received from her union, she alleges at ¶¶58-61 of the FAC that WCCFT - through the agency of then President Anne D'Orazio - advised the employer unlawfully and in contravention of its duty to plaintiff regarding the employer's stated intention to seek further discipline against plaintiff. This assertion rests on the spurious notion that conversations between union officials and administration officials within the context of potentially adverse employment action against a union member is somehow unusual or *per se* evidence of corruption.

Plaintiff further asserts that since plaintiff had not been informed by President D'Orazio that the union may have been shown a draft of a disciplinary letter subsequently delivered to plaintiff the logical inference is that the WCCFT breached its duty to her. Plaintiff, however, fails to allege a single fact that would support even a putative right to know such things prior to receiving a disciplinary letter. In any event, the FAC does make clear that plaintiff was assisted by WCCFT in her ongoing difficulties with her employer at all relevant times.

Incredibly, plaintiff asserts at ¶60 of the FAC that a supposed revision to a disciplinary letter "suggests" that it was the WCCFT who put the idea into the employer's impressionable mind. Even a suggestion requires more than nakedly self-serving assertions.

Straining further to find support of plaintiff's baseless claim, she alleges at ¶62 of the FAC that "apparently Professor D'Orazio" was offended by plaintiff's alleged in-class remarks surrounding an allegedly controversial political poem. This groundless allegation masquerading as a well-pleaded fact simply emphasizes plaintiff's own recognition that her claim lacks a basis in fact.

At ¶66 of the FAC, plaintiff attempts to turn an administrator's purported account of a conversation with President D'Orazio into evidence of breach by asserting that President D'Orazio's conveyance to the employer that the union,

indeed, would defend against the employer's disciplinary claims against plaintiff amounts to proof of bad faith. Plaintiff fails to allege, however, a single fact in support of the assertion that WCCFT did not defend plaintiff.

At ¶67 of the FAC, plaintiff asserts without facts that President D'Orazio intentionally did not disclose these "off the record" conversations.

At ¶69 of the FAC, plaintiff asserts without any offer of proof that President D'Orazio's representation of plaintiff resulted in a step three disciplinary hearing.

On February 26, 2013, in open Court, plaintiff's counsel acknowledged that plaintiff specifically decided not to pursue her disciplinary hearing through to arbitration:

> What she decided not to do was subsequently pursue, appeal that to arbitration.

Transcript of Argument Re Plaintiff's Motion to Amend Complaint, p. 4., a copy of which is annexed hereto as Addendum A.

At ¶76 of the FAC, plaintiff acknowledges the union's continued advocacy on her behalf by admitting that WCCFT officials specifically challenged the employer's approach to student complaints to ensure compliance with an earlier arbitration decision governing such matters. This simply cannot be construed as a breach of a duty of fair representation even assuming the truth of the assertions for purposes of

a motion to dismiss.

Indeed, at ¶78 of the FAC, plaintiff is forced to acknowledge that WCCFT submitted support for plaintiff's defense in writing to the administration. Plaintiff characterizes this submission as "perfunctory" notwithstanding its own earlier admission that plaintiff was in consultation with the union about her defense for a long period of time. Surely, plaintiff could have raised an objection then - or soon thereafter - had she any genuine or legitimate complaints about the representation she received from WCCFT at the time of her disciplinary hearings.

APPLICABLE STANDARD

A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face in order to survive a motion to dismiss. *Fink v. Time Warner Cable*, _ F.3d _, 2013 WL 1859141 (C.A.2 (N.Y.)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009). A claim is deemed to possess facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Id.*

The standard, however, requires more than a "sheer possibility that a defendant has acted unlawfully." *Ibid.* Among other factors, any analysis of the plausibility of a claim must consider the full factual picture presented by plaintiff, the particular elements of the alleged cause of action, and the existence of alternative explanations so obvious that plaintiff's inferences are rendered unreasonable. *See L-7 Designs, Inc. V. Old Navy, LLC,* 647 F.3d 419, 430 (2d Cir. 2011).

Here, plaintiff's conspiracy claims are easily resolved into implausibility once the possibility of lawful motivation on behalf of WCCFT is considered. All facts tend to show the unreasonableness of plaintiff's scenario, most clearly revealed in the union's willingness to pursue her claim all the way to arbitration. Indeed, it is difficult to imagine what could have possessed the union to seek arbitration on

plaintiff's behalf save its duty to fairly represent her in her longstanding dispute with the employer.

ARGUMENT

POINT I

PLAINTIFF'S DFR CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs' DFR claim is time-barred. New York Civil Practice Law and Rules ("CPLR") Section 217(2)(a) provides for a four month statute of limitations for DFR claims:

> [A]ny action or proceeding against an employee organization subject to article fourteen of the civil service law or article twenty of the labor law which complains that such employee organization has breached its duty of fair representation regarding someone to whom such employee organization has a duty shall be commenced within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later.

The four month statute of limitations begins to run on the later of (1) the date the aggrieved employee knows or should have known of the breach, or (2) the date the employee suffered actual harm. *See Alston v. Transport Workers Union of Greater N.Y.*, 225 A.D.2d 242, 639N.Y.S.2d 359 (1st Dept. 1996).

As set forth in the FAC, the timing of any actions taken by the union or which could even remotely be construed as "arbitrary, discriminatory or [made in] bad

faith", *see Matter of Civil Serv. Bar Assn. v. City of New York*, 64 N.Y. 2d 188, 485 N.Y.S. 2d 227 (1984), occurred long before the four months preceding service of the FAC upon WCCFT.

Even assuming the facts as alleged on the face of the FAC, plaintiff was or should have been aware of the alleged facts giving rise to a claim of breach in and around the time of her step three hearing with the employer. It is beyond cavil that plaintiff did not assert a breach of the WCCFT's duty to fairly represent her until years after the fact. Recall that the employer's step three decision was issued on or about June 14, 2011.

Plaintiff now claims that it was only within the purview of the limited discovery already undertaken in this case that she has come to learn of the union's breach. This is patently ridiculous since plaintiff did not raise in her pleadings the slightest disagreement with the representation provided to her throughout the disciplinary process.

Plaintiff is simply seeking to hurl another claim against the wall of implausibility in hopes that something might stick. Claims fall upon such unreasonable hopes.

There simply is no question but that whatever claim plaintiff may have had matured four months beyond the step three hearing way back in June, 2011.

POINT II

THE FAILURE TO ALLEGE THAT EACH AND EVERY MEMBER OF THE UNION AUTHORIZED THE ALLEGED UNLAWFUL ACTS BY THE UNION REQUIRES THAT THIS CASE BE DISMISSED

The WCCFT is an unincorporated labor organization. To the extent the FAC asserts DFR causes of action against the WCCFT, they must be dismissed because the alleged conduct was not authorized or ratified by "each and every member" of the union as required by New York law.

This well-established principle is based on the decision of the New York Court of Appeals in *Martin v. Curran*, 303 N.Y. 276 (1951). *Martin* involved a libel suit against the National Maritime Union of America. The Court upheld the dismissal of the complaint in the action for failure to allege that each and every member of union ratified the conduct at issue.

As the Court of Appeals stated in *Martin*:

> So, for better or worse, wisely or otherwise, the Legislature has limited such suits against association officers, whether for breaches of agreements or for tortuous wrongs, to cases where the individual liability of every single member can be alleged and proven. Despite procedural changes, substantive liability in such cases is still, as it was at common law, "that of the members severally ...' In the kind of association now under consideration, only those members are liable who expressly or impliedly with full knowledge authorize or ratify the specific acts in question.

Id. at 282.

Martin has been repeatedly relied on by labor unions and other unincorporated associations to dismiss claims, and its continued vitality has been acknowledged again and again by various courts in this state. *See, e.g., Salemeh v. Toussaint*, 25 A.D.3d 411, 810 N.Y.S. 2d 1 (1st Dept. 2006); *Duane Reade v. Local 388 Retail, Wholesale, Dept. Store Union,* 17 A.D.3d 277, 794 N.Y.S. 2d 25 (1st Dept 2005), *lv. to appeal dismissed in part, appeal denied in part*, 5 N.Y.3d 707 (2005); *Walsh v. Torres-Lynch,* 266 A.D.2d 817 , 697 N.Y.S. 2d 434 (4th Dept. 1999)(duty of fair representation); *Roth v. UFT*, 5 Misc.3d 888 (Sup. Ct. Kings Co. 2004); *A. Terzi Productions v. Theatrical Protective Union*, 2 F.Supp.2d 485 (S.D.N.Y. 1998) (applying New York law dismissing multiple claims against union).

Indeed, cases have recently been dismissed against the United Federation of Teachers ("UFT"), a teachers' union, due to the failure to allege and prove that 100% of the membership approved the acts in question. *Roth v. UFT, supra.* In particular, duty of fair representation claims have been dismissed against the UFT, as well as other unions due to the failure to comply with the requirements of *Martin v. Curran, supra.*

Thus, in *Walsh v. Torres-Lynch, supra.* The Appellate Division, Fourth Department dismissed a duty of fair representation claim against a teachers union, reasoning that:

> The failure to allege that the individual members of the union authorized or ratified the complained of conduct renders the amended complaint fatally defective as against the union.

See also, Butler v. McCarty, 306 A.D. 2d 607, 762 N.Y.S.2d 129 (3rd Dept. 2003)(dismissing duty of fair representation case against the union due to the failure to comply with *Martin v. Curran*); *Saint v. Pope,* 12 A.D.2d 168, 211 N.Y.S. 2d 9 (4th Dept. 1961) (same); *accord, Mounteer v. Baily*, 86 A.D.2d 942, 448 N.Y.S. 2d 582 (3d Dept. 1982)(describing *Martin v. Curran* as long settled in New York and dismissing case against union).

Plaintiffs have not, and indeed cannot, allege and prove that 100% of the WCCFT's membership ratified and approved the conduct they complain of. Accordingly, the DFR claim should be dismissed on these grounds as well.

POINT III

PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

Plaintiff has admitted that she abandoned her arbitration in favor of other pursuits most notably the instant lawsuit. *See* Transcript of Argument Re Plaintiff's Motion to Amend Complaint, p. 4., a copy of which is annexed hereto as Addendum A.

The law on this issue is gravely clear: an employee may not maintain a state law fair representation claim against her union without first exhausting the remedies available under contract. *See Lewis v. Klepak*, 65 A.D.2d 637, 409 N.Y.S.2d 268 (3d Dept. 1978).

Since plaintiff chose to short circuit the contractual remedies available to her at arbitration, she should not now be permitted to seek to hold liable the very union that was amenable to advancing her claim at arbitration but for her intervening request that it not do so.

POINT IV

THE FAC DOES NOT STATE A CLAIM FOR BREACH OF DFR

1. Plaintiffs Cannot Establish That the Union Breached its Duty of Fair Representation

It is well established that mere errors in judgment or disagreements over approach to conflict resolution in a labor relations context do not constitute a breach of the duty of fair representation, *Albino v. City of New York,* 80 A.D.2d 261, 438 N.Y.S. 2d 587 (2d Dept. 1981), since the union management is not required to be infallible. "In order to establish a breach of the duty of fair representation, it is necessary to show that the union's conduct was arbitrary, discriminatory, or in bad faith." *Hickey v. Hempstead Union Free School District*, 36 A.D. 3d 760, 761, 829 N.Y.S. 2d 163 (2d Dept. 2007), *quoting, Lundren v. Kaufman Astoria Studios, Inc.*, 261 A.D. 2d 513, 514, 690 N.Y.S. 2d 609 (2d Dept. 1999); *Ponticello, supra,* 225 A.D. 2d at 751.

The court may also not become involved in second-guessing the union's decisions to proceed or not proceed on a member's behalf, so long as such determinations are made in good faith. *Jacobs v. Board of Education of East Meadow Union Free School District*, 64 A.D. 2d 148, 409 N.Y.S.2d 234, 237 (2d Dept. 1978), *appeal dismissed*, 46 N.Y.2d 1075 (1979).

Thus, mere negligence or fears about what might have been said in of the record conversations are insufficient to state a cause of action for breach of the duty of fair representation. *United Steel Workers v. Rawson*, 495 U.S. 362, 372 (1990); *Mullen v. Bevona*, 1999 U.S.Dist. Lexis 16434 (S.D.N.Y. 1994).

None of the actions WCCFT took on plaintiff's behalf could even remotely be construed to be "arbitrary or discriminatory" or to have been made in "bad faith." WCCFT made informed decisions, base on consultation with plaintiff, that resulted in representation and full argument at the step three hearing, as well as a willingness to proceed to arbitration.

Even if this Court were to credit plaintiff's allegation that WCCFT was only willing to defend the contract and not the personality or acts of plaintiff, it would still have to acknowledge that it was plaintiff herself who chose to prevent the WCCFT from a possible victory at arbitration which would have resulted in the relief sought by plaintiff in the first place.

In addition, plaintiff has failed to demonstrate how the actions taken by the union reveal that she was somehow treated differently by it as compared to other members.

Hence, the DFR claim should be dismissed on these grounds too.

CONCLUSION

For the foregoing reasons, Defendant WCCFT respectfully requests that his Motion to Dismiss the First Amended Complaint be granted in its entirety, along with such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 24, 2013

RICHARD E. CASAGRANDE
Attorney for Defendant WCCFT
Office & P.O. Address
52 Broadway, 9th Floor
New York, New York 10004
(212) 533-6300

By: _____
CHRISTOPHER M. CALLAGY (CC5115)
Of Counsel

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CAROL LEITNER,

Plaintiff,

v. 12 Civ. 3778 CS

WESTCHESTER COMMUNITY COLLEGE, et al.,

Defendants.

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White Plains, N.Y.
February 26, 2013
3:35 p.m.

Before:

HON. CATHY SEIBEL,

District Judge

APPEARANCES

MORVILLO, ABRAMOWITZ, GRAN, IASON, ANELLO & BOHRER
Attorney for Plaintiff
CATHERINE FOTI
CURTIS BRETT LEITNER

GAINES, GRUNER, PONZINI & NOVICK
Attorney for Defendants
DENISE M. COSSU
JOHN MARTIN MURTAGH, JR.

ALSO PRESENT: CHRISTOPHER CALLAGY

MOTION

THE COURTROOM DEPUTY: Carol Leitner v. Westchester Community College.

THE COURT: Good afternoon Mr. Leitner, Ms Foti, Ms Cossu and Mr. Murtagh. And I guess in the back we have Mr. Callagy from the union.

I have Mr. Leitner's letter dated January 29 regarding plaintiff's desire to amend and I have Ms Cossu's February 19th letter in opposition. And I guess there are two arguments. One, which is perhaps not Ms Cossu and Mr. Murtagh's to make, which is the claim of breach of duty of fair representation and whether that is within the statute of limitations or not. Mr. Callagy, I don't know if you want to be heard?

MR. CALLAGY: Well, your Honor, obviously the record before you doesn't contain any notice of appearance from the union. But I don't think plaintiff's counsel would dispute that whatever harm they complain of occurred long ago and they had reason to believe if they ever felt aggrieved they were armed way back then, well outside the four-month statute of limitations. And I think having reviewed what's attached to plaintiff's counsel letter, even the e-mails they attach do not on their face, even if you accept them as you would at this stage, they do not on their face make out any breach of that duty.

THE COURT: I'm not sure I agree with that. I mean I don't know that they on their face make out anything. The

question is whether they make a breach of duty plausible. And of course I lack the full context. But it did seem to me that at the very least that somebody at the union was helping somebody at the college draft a letter that was going to be given to Mr. Leitner and that somebody at the union said to somebody at the college, off the record but she said it, that -- made remarks suggesting that the union was going to have to grieve Ms Leitner's dismissal so that Ms Leitner wouldn't sue the union, but that the union's heart was not in it because they understood that Ms Leitner had some big problems.

That in the long run is very harmful to Mr. Leitner's case against the college, but it sounds like a sufficiently plausible claim. Of course I would have to see the complaint itself, but to me, it seems to me that would be the basis for drafting a plausible claim.

And with respect to the statute of limitations, it seems to me that what the plaintiff knew a long time ago was that she lost, but I don't know that she would have had a basis to say that the union's heart wasn't in it before she got these documents in 2012.

MR. CALLAGY: If I may, I don't think plaintiff's counsel would dispute, there's a reason the case challenging termination of Professor Leitner did not go forward for arbitration, and that is at the request of Professor Leitner,

the demand for arbitration was withdrawn. It would be perverse in the extreme after extensive discussions with Professor Leitner a long time ago where she requested that the arbitration demand be withdrawn because of a federal lawsuit that they might file or had filed against the college to now say that because they didn't go forward to arbitration is a basis for bringing the union in.

THE COURT: Now I'm realizing something I didn't realize. So the matter in which, according to the off-the-record discussion, the union was kind of just going to go through the motions never came to pass?

MR. CALLAGY: It did not go to arbitration because plaintiff, as I am informed anyway, asked that it not.

MR. LEITNER: If I may, the matter that went forward was a step three hearing which did go forward. The union was representing Professor Leitner at a step three hearing that was to decide whether or not she should be terminated and she lost at that hearing. What she decided not to do was subsequently pursue, appeal that to arbitration. That's what she decided not to do. Had she prevailed at the step three hearing she'd still be teaching here today.

THE COURT: I'm going to allow the amendment with respect to the union. And if you, when you get the complaint, think you have a motion to dismiss you can make you can let me know. It seems to me you are probably more likely to prevail

at summary judgment if you're going to prevail but I won't predict that.

Let me ask a question though, Mr. Leitner. Isn't the union allowed to say, you know what, we think the employer is justified in firing this person?

MR. LEITNER: The union is allowed to decline to go to arbitration but that's not the basis of our claim. Professor Leitner's claim was that the union acted in bad faith by leading her in thinking that it was fighting for her interests when actually it was going behind her back and encouraging the administration to act against her.

THE COURT: You can make that argument, if you like. That's just going to strengthen the college's argument that that's why they fired Professor Leitner. I can hear the argument now. Even our own union thought she was a nightmare. But that doesn't mean that there isn't a DFR claim again the union. I'm going to allow that on the theory that discovery of the breach was November 2012. Of course, if as things develop it turns out that the plaintiff knew or should have known of the claim sooner, then it may be addressed on summary judgment.

Now, the other claim is against the college for breaching the CBA. And I understand why these kinds of claims are brought; I can't say I completely get them. How is it a breach of the CBA for the college to have stood by while the union breached its duty of fair representation?

MR. LEITNER: The claim isn't that the college stood by. The claim is that the union breached the CBA by violating the academic freedom provision. The claim is that the college breached the CBA, not the union.

THE COURT: The theory is the college in its CBA says what? That you have academic freedom and therefore when they fired her based on what she said in class, that was a breach of the CBA?

MR. LEITNER: Yes, when they restricted what she could say in class.

THE COURT: Doesn't the CBA itself say that her freedom is limited in that she has no privilege to discuss in her classroom controversial matters which have no relation to his or her subject?

MR. LEITNER: It does. Professor Leitner's speech wasn't made in the context of a political discussion about a political poem. It's frequent in her class to talk about the subject that is the topic of the student's presentation. That would be like saying in an abortion debate, which she frequently had in her class, she wouldn't be allowed to make a statement that's controversial.

THE COURT: She's a speech teacher, not a politics teacher. If the kids misspelled abortion and you went off on the pros and cons of abortion, I would think that that would not be covered by this provision in the CBA. So we may have

some interesting debate later on about whether in a speech class, the politics, how closely related to her subject the politics may be. And I express no view on that.

What about the defendant's argument that you haven't filed a notice of claim which the Education Law requires.

MR. LEITNER: They cite a provision that only applies to school districts, boards of education, BOCES and related officials. It does not apply to community colleges. So we think it has no application. In fact, WCC is part of Westchester County under the law and there's a different notice of claim provision that applies to counties, except that notice of claim provision doesn't apply to contract claims, it only applies to torts, which we believe is why the defendants have tried to shoehorn their position to it's a wrong notice of claims statute.

THE COURT: What about that, Ms Cossu?

MS. COSSU: Well, I don't have the Education Law in front of me at the moment, your Honor, but I think that the provision of the notice of claim, and I'd be happy to address it in a dismissal motion, but I do believe that the provision of the notice of claim in the Education Law would require that the notice of claim have been filed with respect to this matter. I don't agree with Mr. Leitner on that.

THE COURT: I'll to the same thing. I'll allow the amendment and you can let me know if you think you have a basis

to move to dismiss.

There's also a motion to dismiss pending, and Ms Cossu's letter suggests that the proposed amended complaint makes changes beyond those necessary to bring the new claims, but also changes some things with respect to the previous claims. Is that accurate, Mr. Leitner?

MR. LEITNER: What it changes is a factual inaccuracy that was in the complaint that was actually brought to our attention by defense counsel. We had alleged in the complaint that a certain student incident occurred in 2004 and we were corrected that it actually occurred in 1991, the incident where Professor Leitner said to a student that he had large lips and that may have contributed to the speech issue.

What we did is, the truth of the matter is that that complaint happened in 1991. So we took it out of the complaint and described what actually did happen in 2004.

MS. COSSU: Your Honor, I received a proposed redlined amended complaint over the weekend before my letter to you was due. I wasn't about to engage in a line-by-line. I saw that that particular allegation had been changed. It was removed. My assumption is that the allegations that were contained in that original complaint that was somewhat, that were discussed in the original motion to dismiss, that many of them had been changed. And I would just propose to you that at this juncture that Mr. Leitner should not be permitted to change those

allegations. It may possibly change the Court's determination. It would certainly change my discussion of what the allegations of the complaint were in making my motion to dismiss.

THE COURT: If all he did is correct one --

MS. COSSU: It's not a correction, your Honor. It's a withdrawal of certain factual allegations.

THE COURT: Isn't that what you want?

MS. COSSU: I would like the whole complaint to be dismissed, your Honor.

THE COURT: You're inching your way there. What's wrong with fixing a mistake?

MS. COSSU: But I'm being put in a position where the proposed amendments were very circumscribed. They had to do with Professor Leitner making an allegation of failure to represent, and then an allegation which, if you can establish the failure to represent, then you can come after the college on the breach of contract claim. You must have the precedent of a failure to represent before the college has any liability in that. And I don't think that Mr. Leitner would disagree with me on that discussion or representation as to what the law is.

So my letter to you, your Honor, was solely on that I wanted to bring to the Court's attention that there was some other issues in this proposed amended complaint that Mr. Leitner submitted to us for our review. But basically I

did not engage in that type of an analysis looking at the redline. I only addressed the issues that were presented as what would be necessary to amend the complaint to add these two additional claims.

THE COURT: So why don't we do this. And this is somewhat selfish on my part, but the motion was filed last month and you bundled, so it was fully submitted last month. What I would propose to do is set a schedule for the filing of the amended complaint. I'll deny the pending motions without prejudice to renewal and then it will be up to the defendants who can either tell me you want to submit a whole new motion or if you only want to move against the new part of the complaint and you want to rely on your previously filed papers as to the old part you can to that. If you think there are changes between the old part and the new part such that you want to resubmit the whole thing, that's fine. I don't want to kill trees and I don't want you to have to repeat your work. If it turns out that everything you said in the first motion remains viable and you just want me to rely on your previous set of motion papers supplemented by whatever motion you want to make against the new claims, I'll do that. Or if you want to make a whole new motion that's fine with me too. If you want to give me a new brief but with old declaration since it has all the attachments, whatever, I want to make it easy for you. I don't want to turn to this motion and then three months from now when

the new motion is fully submitted turn to it separately. And I don't want to sit on this one while the other one is being briefed.

When can you file your, is it going to be your first amended complaint or your second?

MR. LEITNER: Our first amended complaint.

THE COURT: How long do you need?

MR. LEITNER: We'd like to file it a couple of days before March 9th. That's the day we receive the discovery that's at issue in the statute of limitations argument.

THE COURT: March 7th, that's --

MR. LEITNER: March 6th.

THE COURT: That's a week from tomorrow. How long after that would you, Mr. Callagy, and you, Ms Cossu, like for your motions to dismiss the first amended complaint?

MS. COSSU: 30 days, your Honor.

THE COURT: Okay. April 5th. And Mr. Leitner, how long for your opposition? Do you want the same thing?

MR. LEITNER: Okay.

THE COURT: That will be May 6th. And reply May 20th.

MS. COSSU: My esteemed colleague advises me that that April 5th date is a holiday.

MR. MURTAGH: Just about a week after Easter and Passover, your Honor.

THE COURT: April 19th. I have so many motions that

it really doesn't matter to me. Do you want 45 days?

MR. LEITNER: It may matter to us, your Honor. We'd like to move things along.

THE COURT: You tell me how long you'd like. I'm going to give them 45 days. You can have 45 if you like.

MR. LEITNER: We'll take 30.

THE COURT: From April 19th would be May 20th and then how long do you need for reply, two weeks?

MS. COSSU: Two weeks is fine, Judge.

THE COURT: June 3rd. I'm going to deny the pending motion without prejudice to renewal. I guess you bundled the last motion. If you're going to bundle this one too just make sure if either side does need a little time that you put in your letter asking for it that you agree to bundle.

MS. COSSU: Just so I'm clear on how to incorporate the prior motion, because I know that you have piles of motions, but it was a pretty substantial motion, and I would not want to have to reinvent the wheel or kill that many more trees.

THE COURT: We have courtesy copies of that motion already?

MS. COSSU: I believe so.

THE COURT: What you can do is you can do it in your notice of motion, in your brief, and just say we hereby incorporate the motion we previously made.

MS. COSSU: I can refer to the docket number.

THE COURT: That's fine. Or if you want to give me a new brief but you don't want to give me all those exhibits again you can just supplement the declaration and incorporate the old declaration, however you like, to minimize duplication. Because I don't want my need to push this, kick this can down the road to inconvenience you guys. All right. Anything else we should do now?

MR. LEITNER: One more issue. We've been having a dispute regarding the scope of discovery permitted by your order on July 27th after our first premotion conference. And we've met several times and haven't been able to resolve it. We're wondering how you'd like us to address that.

THE COURT: What's the dispute?

MR. LEITNER: You ruled on July 27th that Professor Leitner could proceed to document discovery only with respect to her -- not with respect to other professors because the motion to dismiss might narrow things. The other side has given us hard documents in the possession of various defendants and WCC personnel and run a search on the WCC e-mails, it's our understanding, correct me if I'm wrong, for the phrase Carol Leitner. And based on what we've seen so far we imagine there are going to be many more relevant documents that have the words Carol or Leitner or other targeted searches. We think they've missed a lot of important documents.

THE COURT: Right. There might be documents that just say Professor Leitner or Leitner. Can you at least run Leitner? Carol there could be a million.

MR. MURTAGH: Our motion, and I have to say parenthetically I did not expect to be debating this issue, I didn't know this was on the agenda today. I apologize. I don't have the transcript of our prior conference here which I think would be helpful. But it was certainly clear to us, we thought, in context, your Honor, Mr. Leitner, and I see he was anticipating this agenda because he does have the transcript, he was expressing the concern at the first conference that his mother was getting on in years and was concerned to have the case move and so forth. We understood your Honor to direct limited discovery as to Carol Leitner and her personnel records and so forth. We've turned over 5 to 6,000 pages of documents already, every file of anyone connected to the college related to Carol Leitner. Obviously she had a personnel file of 20 years or more. But all of those documents.

Frankly, the notion that at a school, at any institution, but certainly a school the size of Westchester Community College that Mr. Leitner wants our IT people to undertake a search of every e-mail at the college in I guess the last 20 years if there's e-mail that long ago for the name Carol...

THE COURT: That's not happening. What about the name

Leitner? If you did it for Carol Leitner, why not just run the name Leitner?

MR. MURTAGH: Your Honor, I'll ask him to run the name Leitner. We turned over thousands of pages of e-mails. I'm hesitant to suspect that there won't be more, but I'll ask our people to do that.

THE COURT: You need not turn over anything that came out in the first search.

MR. MURTAGH: That makes it more burdensome. Somebody will have to figure that out.

THE COURT: I bet some computer whiz can figure out a way to tell the computer give me everything with Leitner that doesn't also come up when you search for Carol Leitner. One of your undergraduates can probably figure out how to do it.

MR. LEITNER: Also, your Honor, we don't think a global search of every single e-mail account at WCC is necessary for the word Leitner. It can be more targeted to certain people which would reduce Mr. Murtagh's concern. She can run the name Leitner for Dean Wang in a certain period.

THE COURT: I'm all for that. But I don't think --

MR. MURTAGH: We'll search for the word Leitner, your Honor.

THE COURT: It seems very unlikely to me that there will be relevant documents that just discuss Carol without mentioning her last name anywhere in the document. So I think

Leitner is fine. But to the extent you can narrow the users, great.

MR. LEITNER: We want to make sure that we're not limiting ourselves now with respect to after the motion to dismiss when we have the conference before heading into discovery that we can search for more targeted terms like Carol at a specific point.

THE COURT: We'll take it up --

MR. MURTAGH: We have a motion pending, we're now going to go through motion practice again and we're sort of, I don't know if half pregnant is the right analogy, your Honor. We want you to do discovery on your side. Incidentally, your Honor, it might be appropriate for us to start serving discovery demands and the plaintiff at this point which we had not previously requested.

THE COURT: That's up to you. If you want to spend the money on doing it now, God bless. I will take up after the motion is decided what further discovery is appropriate. There's just no point in fighting about it now. Anything else?

MR. LEITNER: No, your Honor.

THE COURT: All right. I will look forward to your papers.

(Proceedings adjourned)